A

LAI RHEN KWAN & ORS v. ASPECT POTENTIAL SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[SUIT NO: 22NCVC-478-09-2015]
5 MAY 2016

B

COMPANY LAW: *Separate legal entity – Lifting of corporate veil – House buyers' claim against company and directors for fraudulent misrepresentation – Liability of directors – Failure to specifically plead lifting or piercing of company's corporate veil – Whether fatal – Whether defect could be cured by amendment – Whether defendants' control over company sufficient ground to lift corporate veil – Whether plaintiffs' claim against directors struck out*

C

CIVIL PROCEDURE: *Pleadings – Facts not pleaded – Lifting of corporate veil – House buyers' claim against company and directors for fraudulent misrepresentation – Liability of directors – Failure to specifically plead lifting or piercing of company's corporate veil – Whether fatal – Whether defect could be cured by amendment – Whether directors liable for alleged false misrepresentation – Whether claim against directors struck out*

D

CIVIL PROCEDURE: *Striking out – Application for – Facts not pleaded – Lifting of corporate veil – House buyers' claim against company and directors for fraudulent misrepresentation – Liability of directors – Failure to specifically plead lifting or piercing of company's corporate veil – Whether fatal – Whether defect could be cured by amendment – Whether directors liable for alleged false misrepresentation – Whether claim against directors struck out*

E

F

The plaintiffs were purchasers of a residential housing project and the first defendant ('D1') was the developer of the project. The second defendant ('D2') and the third defendant ('D3') were the directors of D1. D1 was a wholly owned subsidiary of OSK Property Holdings Bhd ('OSK'). D2 and D3 became directors of D1 on 13 September 2005 and 3 March 2011, respectively. The plaintiffs were amongst the purchasers who entered into their respective sale and purchase agreements ('SPAs') and deed of mutual covenant ('DOMCs') with D1 around the period from 2007 to 2010. On 1 September 2015, the plaintiffs filed an action against the defendants for fraudulent misrepresentation of certain terms, *ie,* in relation to the project being a gated and guarded community, which induced the plaintiffs to purchase their respective properties in the project. D1's position, however, was that under the DOMCs, they were not liable for any loss/damage caused to the residents/purchasers in relation to the provision of the security services and they had the right to discontinue providing any service if the residents/purchasers failed to settle their maintenance charges. Pursuant to the inherent jurisdiction of the court and under O. 18 r. 19 of the Rules of

G

H

I

Court 2012, D2 and D3 proceeded to file an application ('encl. 7') to strike out the plaintiff's claim against them. D3 argued that he only became a director of D1 after the SPAs and DOMCs were executed. As such, it was argued that no claim could be made against D3. In opposing encl. 7, the plaintiffs argued that D2 and D3 as directors of D1 had to be made a party to the suit in order to answer the allegation of fraudulent misrepresentation and they could not hide behind the cloak of incorporation merely because the representations were made in their capacity as directors of D1. On the other hand, D2 and D3 argued that the lifting or piercing of the corporate veil of D1 could not be done since it had not been specifically pleaded in the statement of claim. In response to this, the plaintiffs submitted that it was not fatal if lifting of the corporate veil was not specifically pleaded and in any event, the defect or omission could be cured or overcome by an amendment. The issue that arose for determination was whether a director may be made personally liable for a tort committed by the company where it had not been pleaded that the director had committed actual or equitable fraud so as to justify the lifting or piercing of the corporate veil.

Held (allowing encl. 7 with costs):

(1) The plaintiffs had absolutely no claim against D3 for misrepresentation as he only became a director of D1 after the SPAs and DOMCs were entered into. As such, this was a plain and obvious case for striking out the case as against D3. (para 23)

(2) The lifting of the corporate veil of D1 was not specifically or even vaguely mentioned in the statement of claim. If the plaintiffs' pleaded case does not fit into or fulfil the relevant legal requirements for lifting of the corporate veil, the action against D2 and D3 must then be struck out. In the circumstances, it could not be seen as to how an amendment to the statement of claim could change the factual matrix or the circumstances. (paras 27, 32 & 37)

(3) The imperative position is that even if the express words 'lifting of the corporate veil' were not pleaded, the statement of claim must contain all relevant particulars to support or justify the lifting of the corporate veil. There must be, at the very minimum, a plea (with proper particulars) that D2 and D3 were liable for actual or equitable fraud and/or that D1 was being used as a façade to hide the true facts or that D1 was being used as a front or a cloak to evade or avoid liability. On the facts, the statement of claim did not allude to any lifting of the corporate veil and/or the factual basis for lifting of the corporate veil so as to make D2 and D3 liable for the alleged false misrepresentations. (paras 53 & 54)

(4) The statement of claim stated that D2 and D3 controlled D1 through OSK. However, control *per se,* was insufficient to qualify as a ground for lifting the corporate veil. The plaintiffs have not alleged and did not

A have the basis to contend that D2 and D3 had committed actual or equitable fraud such as to justify the lifting of the corporate veil of D1. (para 56)

(5) The position taken by the plaintiffs to attribute liability to D2 and D3 in relation to their dispute with D1 was wholly untenable and any lifting B of the corporate veil of D1 to impute personal liability on D2 and D3 would be an unjustified extension of the hitherto limited circumstances in which the courts had recognised that the corporate veil of incorporation may be lifted or pierced so as to hold the directors liable for what may, or may not be the wrongdoings by the company. In the C circumstances, this was an appropriate case for striking out as the plaintiffs' claim against D2 and D3 was wholly unsustainable. (paras 60 & 61)

Case(s) referred to:

Ben Hashem v. Al Shayif [2008] EWHC 2380 (Fam) ***(refd)***

D *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC* ***(not foll)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(not foll)***

Ong Thean Chye & Ors v. Tiew Choy Chai & Anor [2011] 1 CLJ 674 CA ***(refd)***

Prest v. Petrodel Resources Limited and Ors [2013] 3 WLR 1 ***(refd)***

E *Quality Concrete Holdings Bhd v. Classic Gypsum Manufacturing Sdn Bhd & Ors [2012] 5 CLJ 33 CA* ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

RDS Bina Sdn Bhd v. Ong Chin Hoe & Anor [2014] 5 CLJ 639 HC ***(not foll)***

F *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC* ***(refd)***

Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***

Victor Cham & Anor v. Loh Bee Tuan [2006] 3 CLJ 770 CA ***(refd)***

VTB Capital Plc v. Nutritek International Corp and Others [2013] 2 AC 33 ***(refd)***

G **Legislation referred to:**

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 1 [2002] Reissue at para [10.6-069]

For the plaintiffs - Aaron Chelliah; M/s Thomas Philip

H *For the 2nd & 3rd defendants - Lim Koon Huan & Susanah Ng; M/s Skrine*

Reported by Kumitha Abd Majid

I

JUDGMENT

S Nantha Balan J:

Introduction

[1] The issue that arises in this case is whether a director of a company may be personally liable for false representations that were allegedly made by the company *albeit* that it has not been pleaded in the statement of claim that the company has been used as a facade or a cloak to evade or avoid liability or that the company has been used to mask the true facts. A related issue that arises is whether a director may be personally liable for a tort committed by the company where it has not been pleaded that the director has committed actual or equitable fraud so as to justify the lifting or piercing of the corporate veil.

[2] These are my grounds of judgment in respect of an application (encl. 7) by the second defendant ('D2') and third defendant ('D3') to strike out the writ and statement of claim pursuant to the inherent jurisdiction of the court and under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012.

Background

[3] The plaintiffs are purchasers of a residential housing project and D1 is the developer of the project. The plaintiffs claim that they were induced into purchasing the property based on representations by D1 which turned out to be false. D2 and D3 are directors of the first defendant ('D1').

[4] The alleged false representation is in relation to the project being a 'gated and guarded community'. The plaintiffs' maintain that D2 and D3 as directors of D1 are personally liable for the false representation.

[5] D1 was incorporated on 13 July 2005. D1 is a wholly owned subsidiary of OSK Property Holdings Berhad ('OSK'). D2 and D3 are also directors of OSK. D1 is involved in property development and is the developer of a residential project known as Mon't Jade ('the project').

[6] The plaintiffs are amongst the purchasers who entered into their respective sale and purchase agreements ('SPAs') and deeds of mutual covenant ('DOMCs') with D1 around the period from 2007-2010. D2 became a director of D1 on 13 September 2005, whereas D3 became a director of D1 on 3 March 2011. Hence, D3 became a director of D1 after the SPAs/DOMCs were entered into. Indeed, there is no suggestion that D3 was a director at the material time when the SPAs and DOMCs were entered into.

[7] Apparently, the SPAs and DOMCs make no reference to the project being a 'gated and guarded community'. But, D1 had constructed a fence around the project and erected a guard house at the entry/exit of the project. In consideration of the residents/purchasers of the project agreeing and duly

A paying maintenance charges to D1 as provided for under the DOMCs, D1 proceeded to maintain the common areas and provided security services. D1 performed those services by utilising the maintenance charges which had been collected from the residents.

B **[8]** D1's position is that under the DOMCs they are not liable for any loss/damages caused to the residents/purchasers in relation to the provision of the security services and that they have the right to discontinue providing any services under the DOMCs in the event of default by the residents/purchasers in settling their maintenance charges.

C **[9]** D1 also asserts that their obligation to maintain the common area and provide security services is only until the formation of the residents' association ('RA') and thereupon, the RA will take over these responsibilities from D1.

[10] On 13 August 2013, the RA for the project was formed and registered D under the Societies Act 1966. However, it is alleged that the RA has refused to take over the responsibility from D1 and as such D1 has no choice but to continue to perform the responsibilities at a loss as the majority of the residents (including 18 out of 23 plaintiffs) did not pay their maintenance charges on time.

E **[11]** Another significant fact is that 82.8% of the residents residing in the project have refused to pay maintenance charges. As such, D1 has given notice (*via* letter dated 24 June 2015) indicating, *inter alia*, that they would no longer extend the contract for security services.

[12] On 1 September 2015, the plaintiffs filed the writ and statement of F claim against the defendants claiming that there was, *inter alia*, fraudulent misrepresentation or misrepresentation of certain terms that 'induced' the plaintiffs to purchase their respective properties in the project. (paras. 5-10 of the statement of claim). It is alleged that the misrepresentations were 'authorised' and/or 'sanctioned' by D2 and D3 and G thereby inducing the plaintiffs to purchase the properties (para. 16 of the statement of claim).

[13] The plaintiffs claim as against D2 and D3 as per para. 16 of the statement of claim reads as follows:

H > 16. The Second and Third Defendants have directed, authorised, counselled or procured the First Defendant to represent to the Plaintiffs as aforementioned and to breach the said Deeds, and are liable jointly and severally therewith. In this regard:
>
> 16.1 the Second and Third Defendants are the ONLY directors of the First Defendant;

I

16.2 the Second and Third Defendants control the First Defendant through the Holding Company; and

16.3 the First Defendant could not have made the representation and/or in breach of the said Deeds without the authorisation or consent of the Second and Third Defendants.

[14] In opposing the application to strike out, it was argued for the plaintiffs that D2 and D3 as directors of D1 have to be made a party to the suit to answer the allegation of fraudulent misrepresentation and that they cannot hide behind the cloak of incorporation merely because the representations were made in their capacity as directors of D1. (See para. 8.3 of the submissions dated 16 February 2016 filed on behalf of the plaintiff).

[15] The plaintiffs rely, *inter alia*, on the decision of the Court of Appeal in *Victor Cham & Anor v. Loh Bee Tuan* [2006] 3 CLJ 770; [2006] 5 MLJ 359 ('*Victor Cham*'s case') where the court was faced with the issue of whether the director of a company should be sued for a misrepresentation made by the company.

[16] In that case, the Court of Appeal affirmed the decision of the trial judge and held that a director cannot escape personal liability by using the corporate veil if he had participated in the wrong. (See: pp. 366 and 367 of the judgment). Thus, it was argued for the plaintiffs in the present case that the *Victor Cham*'s case is strikingly similar and that since the issue of representations by the directors is still subject to be proven at trial, it is vital that D2 and D3 be made parties to this suit. Hence, just as the Court of Appeal in the *Victor Cham*'s case found that a director can be made personally liable for misrepresentation, the plaintiffs here say that their claims against D2 and D3 are also predicated on the same basis and that this is a fit and proper case for determination at a full trial. I will elaborate further on the *Victor Cham*'s case in the later part of this judgment.

[17] Turning to the facts of the present case, the main contention by D2 and D3 is that they are not liable for any alleged wrongs committed by D1 which is a separate legal entity and that they are not even parties to the SPAs/DOMCs. Further, in the case of D3, he asserts that under no circumstances could he be liable for fraudulent misrepresentation as he only became a director of D1 on 3 March 2011, whereas the SPAs/DOMCs were executed during the period from 2007-2010.

[18] The final point that was relied upon by D2 and D3 in seeking to strike out the suit is that unless the veil of incorporation of D1 is pierced, there can be no recourse against D2 and D3 for any personal liability for alleged contractual breaches or tortious wrongs committed by D1.

[19] In so far as lifting or piercing the corporate veil of D1 is concerned, it was argued for D2 and D3 that this cannot be done as lifting of the corporate veil has not been specifically pleaded in the statement of claim.

Further, D2 and D3 maintain that the statement of claim is devoid of any factual circumstances or particulars to justify the lifting of the corporate veil of D1.

[20] In an effort at demonstrating the lack of any contact or communication or proximity or personal dealings with the transactions pertaining to the SPAs and DOMCs, D3 had averred in para. 8 of the affidavit in support (encl. 6) of the application to strike out, that neither he nor D2 have met and/or spoken to any of the plaintiffs prior to or subsequent to them entering into the respective SPAs/DOMCs with D1. In para. 9 of encl. 6, D3 averred that both D2 and D3 never authorised and/or caused D1 to make the alleged misrepresentation to the plaintiffs (if any and which are denied) to induce them to enter into their respective SPAs/DOMCs.

[21] The plaintiffs' response at para. 11 of encl. 9 is important and it reads as follows:

> 11. I have been advised by the Plaintiffs' solicitors and verily believe that the Plaintiffs' claim against the 2nd Defendant and 3rd Defendant is a proper case to lift the corporate veil even though the 1st Defendant is an entity separated from the 2nd Defendant and the 3rd Defendant:
>
> 11.1 The 2nd Defendant and 3rd Defendant can and will liable to the Plaintiffs for the fraudulent misrepresentation and/or the breach of the said Deed committed by the 1st Defendant **even if the 2nd Defendant and 3rd Defendant did not commit the fraudulent misrepresentation personally** or never meet or talk with any of the Plaintiffs before and after the Plaintiffs entered into the agreements with the 1st Defendant. (emphasis added)

[22] The plaintiffs' basis for including D2 and D3 to answer for the alleged fraudulent misrepresentation may also be gathered from the following paragraphs in the plaintiffs' affidavit in reply (encl. 9) which reads as follows:

> 10.1 The Plaintiffs' claim against 2nd Defendant and the 3rd Defendant is based on the directors' liability for the fraudulent misrepresentation and/or the breach of deed of mutual covenants (hereinafter referred to as "the said Deed") committed by one company fully controlled by the 2nd Defendant and the 3rd Defendant, namely the 1st Defendant.
>
> 10.2 The 1st Defendant has only two directors namely the 2nd Defendant and the 3rd Defendant at all material times where the 2nd Defendant and the 3rd Defendant had held the position as a director as stated in the paragraphs 8.2.1 and 8.2.2.
>
> 10.3 The 1st Defendant is an entity fully controlled by the 2nd Defendant and the 3rd Defendant.
>
> 10.4. The 1st Defendant is not possible to make fraudulent misrepresentation and/or in breach the said Deed without the order or consent of the 2nd Defendant and the 3rd Defendant regardless whether the said order or consent is express or implied.

10.5 The existence of a contract between the Plaintiffs and the 2nd Defendant and the 3rd Defendant is not pre-requisite for the Plaintiffs' claim against the 2nd Defendant and the 3rd Defendant.

Analysis And Conclusions

[23] It may be stated quite unequivocally at the outset that the plaintiffs have absolutely no claim against D3 for any sort claim for misrepresentation as he only became a director of D1 after the SPAs and DOMCs were entered into. As such, this is a plain and obvious case for striking out as against D3.

[24] I turn now to consider the position of D2 who was a director of D1 at the material time when the SPAs/DOMCs were executed between the plaintiffs and D1. The plaintiffs' case *vis-a-vis* D2 and D3 as per paras. 5-10 and 16 of the statement of claim appears to be that D2 and D3 have directed and authorised D1 to make false representations. But as I have stated earlier, D3 indisputably falls outside the loop or scope of any liability for misrepresentation as he was not even a director of D1 at the material time when these misrepresentations were allegedly made.

[25] In any event, in the plaintiffs' affidavit in reply at para. 11.1 (encl. 9) it is averred that D2 and D3 will be liable for fraudulent misrepresentation even if D2 and D3 did not personally commit the fraudulent misrepresentation or never met or talked with any of the plaintiffs before and after the SPAs/DOMCs with D1 were entered into.

[26] In para. 11 of that affidavit in reply, the plaintiffs aver that it is a proper case to lift the corporate veil even though D1 is a separate legal entity from D2 and D3. In para. 8.3 of the plaintiffs' submission dated 16 February 2016, it was submitted that D2 and D3 must answer the allegation of fraudulent misrepresentation and cannot hide behind the cloak of incorporation merely because of their capacity as directors of D1.

[27] In terms of the pleadings, it is clear that lifting of the corporate veil of D1 was not specifically or even vaguely mentioned in the statement of claim. It appears that by way of the plaintiffs' affidavit in reply, it is being suggested that D2 and D3 would still be liable for the alleged wrongs committed by D1, even though D2 and D3 were not personally involved in the alleged misrepresentation. It is also suggested in the affidavit in reply and submissions that the mere fact that D2 and D3 are directors of D1 and directors of OSK, is enough to impute them with personal liability for any wrongdoing by D1.

[28] It is also contended by the plaintiffs as per para. 10.4 of encl. 9 that D1 must have made the fraudulent misrepresentations or had breached the DOMCs based on the order or consent of D2 and D3 regardless of whether the said order or consent is express or implied.

[29] On the other hand, it was trenchantly submitted for D2 and D3 that the plaintiffs' case, as presently pleaded and argued, plainly does not fit into the theory or doctrine of lifting of the corporate veil. Further, it was also contended that the mere fact that D2 and D3 are directors of D1 and are directors of the holding company of D1, namely OSK, does not fulfil the legal requirements for lifting of the corporate veil. Counsel for D2 and D3 referred to a number of leading cases on the topic and argued that the test for lifting the corporate veil is whether D1 has been used as a facade to conceal the true facts or to avoid liability and/or whether there was actual or equitable fraud by the directors. The main cases that were referred to are:

(a) *VTB Capital Plc v. Nutritek International Corp and Others* [2013] 2 AC 33 ('*VTB Capital*');

(b) *Ben Hashem v. Al Shayif* [2008] EWHC 2380 (Fam) ('*Ben Hashem*'); and

(c) *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73. ('*Solid Investments*')

[30] Hence, it was contended by counsel for D2 and D3 that based on the matters pleaded in the statement of claim, the affidavits and the submissions, the plaintiffs' case against D2 and D3 does not fulfil the legal requirements for lifting or piercing of the corporate veil of D1. It was argued by counsel that the suggestion by the plaintiffs that the veil of incorporation of D1 should be lifted in order to impose personal liability on D2 and D3 is in the present circumstances, wholly untenable. As such, counsel submitted that this was an appropriate case for striking out against D2 and D3.

[31] Counsel for the plaintiffs responded that it is not fatal if lifting of the corporate veil is not specifically pleaded and that in any event the defect or omission can be cured or overcome by an amendment. Counsel also argued that full particulars of fraud need not be pleaded. Counsel for the plaintiffs cited the case of *Quality Concrete Holdings Bhd v. Classic Gypsum Manufacturing Sdn Bhd & Ors* [2012] 5 CLJ 33; [2012] 2 MLJ 521 where the Court of Appeal enunciated in paras. [71], [72] and [73] that full particulars of fraudulent misrepresentation need not be pleaded.

> [71] Patently the learned JC erred when he held that the plaintiff failed to plead the 'full particulars' of the fraudulent misrepresentation as envisaged under O. 18 r. 12 of the Rules of the High Court 1980 ('RHC'). In reality, the plaintiff pleaded at para 11 of the amended statement of claim at p. 64 of the appeal record at Vol 1/Part 'A' and 'B' as follows:
>
> Particulars of Falsity
>
> The defendant knew and intended that the first defendant would not make any immediate payment or any payment at all to the plaintiff as represented.

[72] Pleadings, as a general rule, should contain particulars to ensure that the parties are informed with reasonable particularity as to the matters which are alleged against them. The reason for this simple principle is this. That no party should be taken by surprise (*Lim Kee Tiak v. Lim Kee Tian* [1987] 2 MLJ 528; and *Bangkok Bank Ltd v. Prosperity Shipping & Trading (Pte) Ltd & Ors* [1990] 1 MLJ 29). Another reason would be the desire to limit and define the issues at the trial (*Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615) as well as to save time and expense (*Spedding v. Fitzpatrick* (1888) 38 Ch D 410). All these would surely put the parties in a better position to prepare for trial (*Thorp v. Holdsworth* (1876) 3 Ch D 637).

[73] According to O 18 r 12(1) of the RHC only the 'necessary particulars' need be pleaded and not the 'full particulars' as required by the learned JC. It is obvious that the learned JC erred in law on this point.

The Imperative Question

[32] The imperative question here is whether on the pleaded case, there is justification to impute liability on D2 and D3 as directors of D1 by lifting the corporate veil of D1 so as to hold them personally liable for the alleged wrongdoing of D1. It is trite that if the plaintiffs' pleaded case does not fit into or fulfil the relevant legal requirements for lifting of the corporate veil, then the action as against D2 and D3 must be struck out.

Striking Out – The Law

[33] In this regard, it is I think relevant to have regard to the salutary guidance given by the learned authors of *Halsbury's Laws of Malaysia*, vol. 1 [2002] Reissue at para. [10.6-069] where the principles concerning the court's summary powers to strike out a claim are set out as follows:

... These powers are both salutary and necessary not only to enforce the basic rules of pleadings but also to dispose of proceedings which are hopeless, baseless or without foundation in law or in equity or are otherwise an abuse of the process of the court. The powers are exercised by the court by summary process, speedily and generally at an early stage of the proceedings, and they operate as a powerful, effective method of disposing of proceedings without a plenary trial.

[34] The next principle that must be borne in mind is that the court also has the inherent jurisdiction to strike out a claim if it cannot possibly be maintained in law and where it would be vexatious and a waste of time and money to allow it to proceed. This was articulated by the then Supreme Court in *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16 SC.

[35] More recently, the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1 restated the principles on striking out and these are to be found in the judgment of Ramly Ali FCJ which reads as:

A Our Judgment: Principle For Striking Out

[24] The appeal before us relates to an application to strike out pleading summarily under O. 18 r. 19 of the ROC on the ground that paras. 22-29 of the respondents' statement of claim are scandalous, frivolous or vexatious, or is an abuse of the process of the court.

B [25] The principles for striking out pleadings pursuant to O. 18 r. 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see: *Bandar Builder* (*supra*), *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; C *Attorney General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

[26] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* (*supra*) are, *inter alia* as follows:

D

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (emphasis added);

E

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; and

(d) If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down F for argument under O. 33 r. 3 of the ROC; and

(e) The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

G [27] The Court of Appeal, in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473, had adopted the well-settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact H that is capable of resolution only after taking *viva voce* evidence during trial, (see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 (Federal Court)).

[28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* (*supra*) is that the claim on the face of it must be I 'obviously unsustainable'. The stress is not only on the word

'unsustainable' but also on the word 'obviously' ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 at p. 407:

> ... The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...
>
> This passage was cited with approval by the Privy Council in a Malaysian case of *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212.

[36] The question ultimately is whether there is a plausible case for lifting of the corporate veil and this in turn will depend on whether the plaintiffs' case satisfies the relevant legal principles in respect of lifting of the corporate veil.

[37] I must say at the outset, that given the responses made by the plaintiffs as per their affidavit in reply (encl. 9) and the way the case was argued in opposing the application to strike out, I cannot see how an amendment can change the factual matrix or the circumstances.

[38] For instance, the fact that D3 was not a director of D1 at the material time when the SPAs and DOMCs were executed cannot be disputed. As such an amendment in this respect is a non-starter. Further, the plaintiffs have conceded by virtue of para. 11 of their affidavit in reply that they are holding D2 and D3 liable purely because they are directors of D1, *albeit* they may not have personally committed false misrepresentation. Also, it is alleged that D1 is not capable of making false representation unless it was consented to or authorised by its directors D2 and D3. Lastly, it is alleged that D2 and D3 should be liable because OSK controls D1. I am unable to fathom what else the plaintiffs can say by way of an amendment that has not already been stated in the pleadings and affidavit.

[39] In any event, having admitted by way of para. 11.1 of encl. 9 that D2 and D3 will be liable for fraudulent misrepresentation even if they did not personally commit the fraudulent misrepresentation or never met or talked with any of the plaintiffs before and after the SPAs/DOMCs with D1 were entered into, I am not at all certain what is it that the plaintiffs can now say differently by way of an amendment that will change the factual matrix.

Lifting The Corporate Veil- The Law

[40] I propose now to examine the principles on lifting of the corporate veil that were enunciated in the following cases:

(a) *VTB Capital Plc v. Nutritek International Corp and Others* [2013] 2 AC 33 ("*VTB Capital*");

(b) *Ben Hashem v. Al Shayif* [2008] EWHC 2380 (Fam) ('*Ben Hashem*'); and

(c) *Solid Investments Ltd & v. Alcatel-Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73 (FC). ('*Solid Investments*').

[41] In *VTB Capital* (*supra*), the Supreme Court of the United Kingdom upheld the decision of the Court of Appeal which held that there is only one situation that would justify the court looking behind a company's corporate facade, and that is where the company was a mere facade concealing true facts.

[42] Lord Neuberger in *VTB Capital* (*supra*) quoted Munby J in *Ben Hashem* (*supra*) who said that 'it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is mis(use) of the company by them as a device or facade to conceal their wrongdoing ... at the time of the relevant transaction(s)'.

[43] In *Ben Hashem* (*supra*), Munby J at paras. 159-163 set out the following principles culled from various cases which circumscribe the instances which may justify the lifting of the corporate veil:

(a) Ownership and control of a company are not of themselves sufficient to justify piercing the veil;

(b) Court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice

(c) Corporate veil can only be pierced if there is some impropriety;

(d) Court cannot pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability;

(e) If the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is mis(use) of the company by them as a device or façade to conceal their wrongdoing.

[44] The cases of *VTB Capital* (*supra*) and *Ben Hashem* (*supra*) were referred to and followed by the Malaysian Court of Appeal in Civil Appeal No. W-02(NCC)-2339-10-2012 (*Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491). In *Solid Investments* (*supra*), the Federal Court upheld the decision by the Court of Appeal that in order to lift the corporate veil, actual fraud or some conduct amounting to fraud in equity must be pleaded or made out in evidence.

[45] I turn now to consider the judgment of Lord Sumption in the seminal case of *Prest v. Petrodel Resources Limited and Ors* [2013] 3 WLR 1, [2013] BCC 571, [2013] 2 AC 415, [2013] 3 FCR 210, [2013] WTLR 1249, [2014] 1 BCLC 30, [2013] WLR(D) 237, [2013] UKSC 34, [2013] Fam Law 953, [2013] 2 FLR 732, [2013] 4 All ER 673, where he gave the following opinion with regards to the test for lifting or piercing of the corporate veil. He said:

> 27. In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are *obiter*, because the corporate veil was not pierced.
>
> It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.
>
> 28. The difficulty is to identify what is a relevant wrongdoing. References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both

A categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

...

B 34. These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that C a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about. Thus in a case like VTB Capital, where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was D that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that any one else should be party to it. But the objection would have been just as strong if the liability in question had not been consensual.

E 35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and F only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like G Munby J in Ben Hashem, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in VTB Capital who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied.

H But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy.

I

[46] The next case to consider is *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719; [2015] 1 MLJ 773 ("*Gurbachan*'s case") where the Federal Court had occasion to deal with the question, *inter alia*, whether the failure to plead lifting of the corporate veil is fatal. In *Gurbachan*'s case, the Federal Court also examined and approved of the legal principles on lifting of the corporate veil that were established by some of the cases referred to earlier in this judgment. The following passages from the judgment of the Federal Court are instructive:

> [89] It is trite law that the parties are bound by their pleadings and the trial of a suit must confine to the pleadings. The court is not entitled to decide a suit on a matter that has not been pleaded (see *Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330).
>
> [90] However, in some instances, evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise. More so if 'Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading' (see *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567).
>
> [91] In this case the respondents while conceding that issue on lifting the corporate veil of the companies was not pleaded argued that the evidence relating to the issue was adduced. As such the learned trial judge had erred in dismissing the issue on the ground that it was not pleaded.
>
> [92] We find the majority has dealt with the point quite succinctly. Having considered the evidence adduced by the respondents as highlighted by the majority, we are satisfied that evidence relating to the issue of whether the third appellant and SPPKB were one and same entity and whether the first appellant was the alter ego of the fourth appellant had been given without any objection from the appellants.
>
> [93] For instance, it was not a disputed fact and indeed evidence was adduced that the directors of SPPKB replaced the directors of Nam Bee as the directors of the third appellant. That occurred soon after the estate land was transferred to the third appellant. and in respect of the fourth appellant there was no denial and in fact the first appellant admitted that he was its director for a while.
>
> [94] Hence, having considered the case for the respondents as a whole it could not be said that such evidence had departed radically from their pleaded case. Such evidence, in our view, had cured the absence of a specific plea of the aforementioned parties being one and same entities in the respondents' statement of claim. With respect we are therefore of the view that the learned trial judge should not have dismissed the issue on account of it being not pleaded.

A [95] Accordingly on the facts and circumstances of this case our answer to Question 3 as we understand it is in the affirmative. Anyway, we do not think it is necessary for us to deal with the issue of the actual lifting of the corporate veil as done by the majority.

B [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality (see *Prest v. Petrodel Resources Limited and others* [2013] UKSC 34).

C [97] As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity (see *Law Kam Loy & Anor v. Boltex Sdn Bhd and others*). And fraud in equity occurred in '... cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...' (see *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 per Chong Siew Fai FCJ (as he then was)).

D [98] Quite recently this court also discussed on the issue of lifting a corporate veil. It said this:

> ... As for principle, the starting point is no doubt the doctrine of
E corporate personality. The general rule is that a company has an existence that is separate and distinct from its shareholders. It finds expression in the seminal case on the subject, *Salomon v. A Salomon & Co Ltd* [1897] AC 22. Lord Halsbury LC there stated the rule thus:
>
> F > ... once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.
>
> G The Lord Chancellor however provided for cases in which the veil of incorporation may be lifted. He said:
>
> > If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.
>
> H > The proposition when inverted states that if there is fraud or an agency relationship or if the company is a myth or fiction, the doctrine of corporate personality does not insulate the shareholders or directors from being assailed directly.

I [22] A more recent statement of the doctrine of corporate personality is to be found in the case of *Woolfson v. Strathclyde Regional Council* 1978 SLT 159 which is authority for the proposition that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts (see *Takako Sakao (f) v. Ng Pek Yuan (f) & Anor*).

[99] The phrase 'a mere façade concealing the true facts' was recently elaborated by the Supreme Court of the United Kingdom in the case of *Prest v. Petrodel Resources Limited and others* [2013] UKSC 34. The leading judgment of the court said this:

> The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is the imposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'façade' but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil. (emphasis added)

[47] On the pleading point, it is relevant to note that in *Ong Thean Chye & Ors v. Tiew Choy Chai & Anor* [2011] 1 CLJ 674; [2011] 4 MLJ 616 the Court of Appeal at para. 76 stated that:

> [76] The respondent's statement of claim did not allude to the need to lift the veil of incorporation of the third appellant and we are reluctant to do so. The parties are bound by their pleadings.

[48] Still on the pleading point, in *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537; [2015] 6 MLJ 449 FC ("*Giga Engineering*") particularly at p. 462 of the judgment, the Federal Court unequivocally emphasised the need for specific pleadings in terms of the particulars of actual or equitable fraud in order that the veil of incorporation may be lifted. The Federal Court held that in that case, the particulars in the statement of claim were insufficient to support a plea of actual or equitable fraud and as such, there was no justification for the lifting of the corporate veil. The opinion of the Federal Court in this regard was as follows :

> [35] Indeed there was no allegation in the amended statement of claim that the plaintiff was not awarded the sub-sub contract works as a result of manipulation or the abuse of the 'single' entity of the defendants.
>
> [36] It is also not pleaded that in the scheme of things the defendants and the third defendant were under the dominant control of Yip Kok Weng. There was also no allegation in the amended statement of claim of fraud or equitable fraud or misrepresentation practised by the defendants upon the plaintiff during the discussion in the preparation of quotation or tender documents for the project.

A [37] Yet in his submission learned counsel for the plaintiff urged us, *inter alia*, to consider lifting the corporate veil of the defendants. Unfortunately, we find nothing in the amended statement of claim that alleged the defendants committed fraud, actual or equitable fraud upon the plaintiff. There was also no allegation that the defendants misled the plaintiff.

B [38] At best the plaintiff merely pleaded that the first and second defendants:

(a) 'are ... part of a group of companies managed and or controlled by the Yip family with common and or connected officers and shareholders'; and

C (b) that 'having regard to the relationship inter-se the parties arising from the joint venture and further upon the defendants having, with knowledge and encouragement, obtained the benefits of the plaintiff's input and efforts as set out above, the defendants, in particular the first and second defendants, were under the following

D implied obligations towards the plaintiff in relation to the plaintiff's portion:

(i) not to act in any manner inconsistent with the agreement on the plaintiff's portion;

E (ii) to, *inter alia*, cooperate and take all necessary steps to ensure that the plaintiff be awarded the plaintiff's portion pursuant to the agreement on the plaintiff's portion.

[39] With respect, we do not think the foregoing allegations as pleaded are sufficient as a plea for fraud or equitable fraud or to indicate special circumstances upon which on evidence adduced would justify the lifting

F of corporate veil of the defendants.

[49] However, the plaintiffs relied on the decision of the High Court in *RDS Bina Sdn Bhd v. Ong Chin Hoe & Anor* [2014] 5 CLJ 639; [2014] 11 MLJ 606 HC ("*RDS Bina*") where the learned judge said:

G [36] However, it is to be noted that in none of these decisions has the Court of Appeal say what is meant by a specific plea; whether it meant that the phrase 'lifting of the corporate veil' or words to that effect must be made. All that the Court of Appeal said was that there must be a specific plea. So, how should the plea be?.

H [37] In this regard, assistance may be rendered by the Rules of the High Court 1980 (when this claim was filed) or the present Rules of Court 2012 (there is no difference between the two sets of Rules on this). Quite apart from the fundamental principle that parties are bound by their pleadings, in the matter of the requisites of their pleas, there is O. 18 r. 12 of the Rules of Court 2012 which reads as follows:

I 12(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including without prejudice to the generality of the foregoing words:

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies on;

(b) where a party pleading alleges any condition of mind of any persons whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies on.

[38] Pursuant to this order, the plaintiff is required to particularise what is in essence, special pleas. Examples of such pleas are given but it may be said that the list is by no means exhaustive. There is also O. 12 r. 11 which states that a party may raise any point of law in their pleadings. The rationale behind such a requirement resides in the principle of fair play and a just trial. For that purpose, the other party is alerted by this particular allegation or plea, answers or addresses it in the best way that the party thinks fit and so that it may present evidence or plead with the court at trial. Nowhere in any of these rules is there any provision to the effect as to the precise language or terms to be used. What is important is that the special plea must be made and the other side is not embarrassed by the plea and is able to respond to the plea.

[39] Here, this rule is not offended at all as the plea has indeed been raised and in my view, more than adequately. The plaintiff has pleaded sufficiently and there is no prejudice alleged or otherwise occasioned to the defendant. I agree with learned counsel for the plaintiff that no specific language is required. Although the words 'lifting of the veil of incorporation' may not have been specifically used, there are more than adequate pleas in this statement of claim to satisfy the dictates of the Rules of Court 2012; and capture the essence of the plea. This can be gleaned from the following paragraphs: paras 8-11, 14-15, 20 and 23 onwards and more specifically paras 29-59. At these latter paragraphs, the plaintiff identified the particular matters in the statutory declaration that it claimed were incorrect and untruths that were inserted to mislead SSM into striking Springs Court from the register. The plaintiff gave its reasons as to why it made these allegations.

[40] These paragraphs contain the details, particulars, grounds and circumstances upon which the plaintiff seeks to move the court. These paragraphs in the statement of claim are detailed and comprehensive. They are adequate so much so that the defendants were unimpeded and were able to respond to them quite readily and comprehensively. These paragraphs in the defence will illustrate this: namely paras 6, 17 and 18; and from paras 19 onwards to 29 were specific responses to the allegations on the statutory declaration. Paragraph 6 is of particular interest and it reads:

> 6. Perenggan 11 sehingga 12 SOC tersebut adalah dinafikan dan Plaintif diletakkan di atas beban bukti kukuh. Defendan-Defendan menafikan bahawa mereka adalah minda yang mengawal OCH Properties, Springs Court dan satu syarikat yang dipanggil Ong Chin Hoe & Sons Sdn Bhd. Syarikat-syarikat ini adalah/masih

A adalah badan undang-undang berasingan ('separate legal entities') dan adalah personalti berbeza daripada Defendan-Defendan yang mana Plaintif telah memilih untuk membawa tindakan ini terhadap.

[41] I therefore do not find this argument of any merit.

B **[50]** In *Gurbachan*'s case, evidence with regards to the company being set up as a front and the issue of lifting of the corporate veil was ventilated during the trial, *albeit* that there was no specific plea to that effect in the pleadings. But the Federal Court opined that it was too late for any objection based on pleadings to be taken by the appellants. For my part, I do not read the C Federal Court's decision as obviating the need for a proper plea for lifting of the corporate veil. That was a case where there was evidence and a finding that the company was used as a facade to evade fiduciary obligations. This may be gathered from para. 102 of the judgment of the Federal Court which reads as follows:

D As such, on the facts as found, we agree with the finding of the majority that the fourth appellant was the alter ego of the first appellant. The first appellant established the fourth appellant as a mere facade to transfer the ownership of the estate land in order to evade his fiduciary obligations as the solicitor towards his clients, the purchasers including the respondents. (emphasis added)

E

[51] In *RDS Bina* the High Court rejected the objection based on the non-pleading of lifting of the corporate veil. In my view, the decision of the High Court in that case merely reiterates that the specific words 'lifting of the corporate veil' need not be expressly stated in the pleading so long as the F relevant facts and particulars are stated in the pleadings. In that case the learned judge was satisfied that the statement of claim contained sufficient facts and particulars such that the defendants were not prejudiced or taken by surprise.

[52] In the present case, it can be seen quite clearly that the plaintiffs' case G *vis-à-vis* D2 and D3, as pleaded and the subsequent position taken by the plaintiffs in the affidavit in reply appears to suggest that D2 and D3 would be liable as directors because OSK controls D1 and/or that D2 and D3 would be liable because D1 is not capable of making misrepresentations unless these were sanctioned or authorised by D2 and D3. To my mind, the H latter suggestion by the plaintiffs is at best, surmise and conjecture and eminently qualifies as a 'bald assertion'. There is just nothing to connect D2 and/or D3 to any fraudulent misrepresentation.

[53] Having considered all the case laws on this point, it is my conclusion that *Gurbachan*'s case and *RDS Bina* are not authorities that support the I proposition that there is no need to plead the lifting of the corporate veil and/or the circumstances/particulars relevant thereto. In my view, those cases are confined to their own peculiar facts and cannot be construed as laying down any principle of general application with regards to the need for a

proper plea so as to justify the lifting of the corporate veil. The imperative position is that even if the express words 'lifting of the corporate veil' are not pleaded, the statement of claim must contain all relevant particulars to support or justify the lifting of the corporate veil. In the present case, I find that the statement of claim to be woefully devoid of the requisite particulars to justify the lifting of the corporate veil.

[54] In my view, the correct legal position is the one that was enunciated by the Federal Court in *Giga Engineering* in terms of the need for a proper plea in order to justify the lifting of the corporate veil. Consequently, the view I take is that there must be at the very minimum, a plea (with proper particulars) that D2 and D3 are liable for actual or equitable fraud and/or that D1 was being used as a facade to hide the true facts or that D1 was being used as a front or a cloak to evade or avoid liability. Here, the statement of claim does not allude to any lifting of the corporate veil and/or the factual basis for lifting of the corporate veil so as to make D2 and D3 liable for alleged false representations.

[55] I also find that the plaintiffs' pleaded case against D2 and D3 (per para. 16 of the statement of claim) has been unambiguously contradicted or watered down by para. 11 of the plaintiffs' affidavit in reply (encl. 9) where the plaintiffs have averred in para. 11.1 that:

> 11. I have been advised by the Plaintiffs' solicitors and verily believe that the Plaintiffs' claim against the 2nd Defendant and the 3rd Defendant is proper case to lift the corporate veil even though the 1st Defendant is an entity separated from the 2nd Defendant and the 3rd Defendant:
>
> > The 2nd Defendant and 3rd Defendant can and will liable to the Plaintiffs for the fraudulent misrepresentation and/or the breach of the said Deed committed by the 1st Defendant even if the 2nd Defendant and 3rd Defendant did not commit the fraudulent misrepresentation personally or never meet or talk with any of the Plaintiffs before and after the Plaintiffs entered into the agreements with the 1st Defendant.

[56] Apart from the fact that the plaintiffs have expressly or implicitly admitted that D2 and D3 have not personally committed fraudulent misrepresentation, there is also reference in the statement of claim to control of D1 by D2 and D3 through OSK but following *VTB Capital* and *Ben Hashem* (*supra*), control *per se* is insufficient to qualify as a ground for lifting of the corporate veil. Ultimately, it is clear that the plaintiffs have not alleged and have absolutely no basis to contend that D2 and D3 had committed actual or equitable fraud such as to justify the lifting of the corporate veil of D1.

[57] I turn now to *Victor Cham*'s case (*supra*). In that case the Court of Appeal upheld the trial judge's finding that the first appellant who was a director and shareholder of the company was liable for misrepresentation that was committed by the company. In that case, the first appellant had executed the sale and purchase agreement on behalf of the company. The sale and purchase agreement falsely represented that the title to the land was unencumbered. The relevant parts of the judgment in relation to liability of the director/shareholder reads as follows:

> [12] The issue before us is whether the first appellant here had authorised the commission of the fraudulent misrepresentation as contained in the SPA.
>
> [13] Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim, the respondent in this case need to establish that he had acted in reliance on the fraudulent misrepresentation and that the representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation, the respondent had suffered damage. For the elements of the tort of deceit, see *Panatron Pte Ltd v. Lee Cheow Lee* [2001] 3 SLR 405.
>
> [14] The learned judge having considered the facts in this case came to his finding that he was satisfied beyond reasonable doubt that the fraudulent misrepresentation could not have been committed by the first defendant without the authorisation or consent of first appellant, who was not only the director and secretary of the first defendant but also holds a substantial shareholding in the first defendant company. We have carefully scrutinised the reasons given by the learned judge and we are satisfied that he was wholly justified in coming to the said conclusion. Firstly, it is not in dispute that the first appellant signed the SPA in his capacity as secretary and director of the first defendant.
>
> Even though in his testimony he claimed that he did not read the SPA before putting his signature to it, we agree with the learned judge that this is difficult to accept for the following reasons. The first appellant is an educated man. He works as the office manager of a law firm. In his evidence, he said that as office manager of a law firm he is familiar with conveyancing procedure. So it is reasonable to assume that he must have read the fine letters of the SPA before putting his signature to it. Coupled with that is the fact that his own brother DW2, who was found by the learned judge to be the brain behind the scheme to attract potential purchasers for the said project, was the person responsible for the preparation of the SPA, which promised a clean title. In this regard, we also need to take into account the fact that only two SPAs were executed in respect of the project. It is, therefore, highly unlikely in the circumstances for the representation contained the SPA to have escaped the attention of the first appellant. Thus from the evidence before the court, we agree with the finding of the learned judge that the said fraudulent misrepresentation could not have found its way into the SPA without the approval of the first appellant.

[58] In my view, the veil of incorporation was rightly lifted in the case of *Victor Cham* and the director held personally liable as there was evidence of the director's personal involvement and also evidence that he was closely and proximately connected with the transaction and the representation that was made to the purchaser. It was significant that the director in that case was also the office manager of the law firm which prepared the sale and purchase agreement and the court found that there were only two sale and purchase agreements that had been prepared and that the warranty as to the title being unencumbered could not have escaped the attention of the director who executed the agreement on behalf of the company.

[59] In the present case, the plaintiffs' position is that D2 and D3 (*albeit* that D3 was not even a director of D1 when the SPAs and DOMCs were executed between 2007-2010) should be held personally liable because they are directors of D1 and OSK and that such personal liability arises even though they did not personally commit any fraudulent misrepresentation.

[60] In my view, the position that has been taken by the plaintiffs to attribute liability to D2 and D3 in relation to their dispute with D1 is wholly untenable and any lifting of the corporate veil of D1 to impute personal liability on D2 and D3, would in the present circumstances, be an unjustified extension of the hitherto limited circumstances in which the courts have recognised that the corporate veil of incorporation may be lifted or pierced so as to hold directors liable for what may (or may not be) wrongdoings by the company.

[61] In all the circumstances, having considered the relevant legal principles and submissions and having taken a robust view of the pleadings and the matters alluded to in the affidavits, I was impelled to the conclusion that this was an appropriate case for striking out as the plaintiffs' claim against D2 and D3 is wholly unsustainable. In the result, I allowed encl. 7 with total costs of RM12,000 to be paid forthwith by the plaintiffs to D2 and D3 (subject to 4% allocator).

Order accordingly.